

Supreme Court, U.S.
FILED

OCT 18 1977

MICHAEL RODAK, JR., CLERK

In The Supreme Court
of the
United States

TERM, 1977

No. 77 - 570

Bernecia E. Avery, *Petitioner*

v.

New England Telephone and
Telegraph Company

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Norman J. Bernstein, Esq.
Londonderry, Vermont 05148
Counsel of Record for Petitioner

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ATTORNEY & COUNSELOR AT LAW

West Pawlet, Vermont 05775

United States of America

**IN THE
SUPREME COURT OF THE UNITED STATES**

Term, 1977

No. _____

Bernecia E. Avery, Petitioner

v.

**New England Telephone and Telegraph
Company**

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Bernecia E. Avery, the petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit on May 24, 1977.

A. OPINIONS BELOW

1. The judgment dated and filed May 24, 1977 (File No. 77-7143) of the United States Court of Appeals for the Second Circuit is printed as Appendix A hereto.
2. The memorandum and order of the United States District Court for the District of Vermont, dated December 23, 1976 (File No. 76-223) is printed as Appendix B hereto.

B. JURISDICTION

1. The judgment of The United States Court of Appeals was entered on May 24, 1977. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(a).

C. QUESTION PRESENTED

Whether it is lawful for a telephone company in a monopoly position to disconnect telephone service of an aged (84) woman who is a semi-invalid, living alone and of meager means, when the amount due, after crediting a large deposit exacted of her, was less than ten (\$10) dollars and no personal contact was made with her prior to disconnect.

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 14th Amendment to the U. S. Constitution.
2. 42 U.S.C. section 1983.

E. STATEMENT OF THE CASE

1. The case is aptly summarized in the memorandum and order of the District Court - Appendix B herein.
2. As brought out in the hearing on the application for temporary restraining order on October 28, 1976 in the District Court, petitioner owed \$7.73 when her phone service was disconnected. No contact was made by the phone company with petitioner prior to disconnection.
3. Petitioner's life was twice placed in jeopardy after the disconnection and prior to suit, due to her disability and infirmity and virtual loss of contact with the outside world. She suffered the attendant fear and anguish from such loss.

F. THE RULINGS BELOW

The District Court (affirmed by the Court of Appeals) relied solely on *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) to dismiss the complaint on motion of defendant.

G. REASONS FOR GRANTING THE WRIT

1. The facts and issues of the Jackson case are markedly different from those herein. For petitioner, phone service is a vital necessity.
2. *Goss v. Lopez*, 419 U.S. 565 overturns the statement in "Jackson" that there is no constitutionally protected right to continue utility service once that service has been furnished. See *Dawes v. Philadelphia Gas Company* 421 f. supp. 806, 816 (1976)
3. Petitioner's fundamental rights of life, liberty and property were blatantly deprived and she should have access to the federal courts for redress of wrongs and damages.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

BERNECIA E. AVERY,
Petitioner

by

Norman J. Bernstein, Esq.
Counsel

Appendix A
United States Court of Appeals
for the
SECOND CIRCUIT

**AFFIDAVIT OF SERVICE
AND APPEARANCE**

The undersigned hereby enters his appearance in the above captioned matter and affirms that he served the respondent company by mailing three copies of the foregoing to counsel for respondents, Richard H. Wadnams, Jr. of Pierson, Affolter & Amidon, 253 South Union Street, Burlington, Vermont 05401, postage prepaid on the _____ of August, 1977.

Norman J. Bernstein, Esq.
Londonderry, Vermont 05148

Sworn to and subscribed to before me

this _____ day of August, 1977.

_____, Notary Public

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of May one thousand nine hundred and seventy-seven.

Present: HON. WALTER R. MANSFIELD
Circuit Judge

HON. EDMUND L. PALMIERI

HON. RUSSELL E. SMITH
District Judges

Circuit Judges

Bernecia E. Avery,
Plaintiff-Appellant

v.
New England Telephone and Telegraph Company,
Defendant-Appellees.

77-7143

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is dismissing the complaint be and it hereby is affirmed. The court lacks jurisdiction over the subject matter, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The complaint fails to allege the necessary state action required to set forth a claim pursuant to 42 U.S.C. §1983.

[Signature]
Walter R. Mansfield, U.S.D.J.

[Signature]
Edmund L. Palmieri, U.S.D.J.

[Signature]
Russell E. Smith, U.S.D.J.

Filed December 27 1974
George J. Victoria,
Deputy Clerk

Appendix B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Bernicia E. Avery) Civil Action
v.) File No. 76-223
New England Telephone and)
Telegraph Company)

MEMORANDUM AND ORDER

The plaintiff has brought this action seeking declaratory, injunctive and monetary relief against the defendant corporation. She alleges that the defendant improperly disconnected her telephone service for nonpayment of her monthly bills. She claims that the defendant's actions have cut her off from the necessities of life, interfered with her social life, and endangered her health. She alleges that the defendant has thus deprived her of civil and constitutional rights under the United States and Vermont constitutions and statutes.

On October 28, 1976, the case came on for a hearing on the plaintiff's request for a temporary restraining order. At that time the plaintiff sought immediate restoration of telephone service. The court denied the application on the grounds that the plaintiff had not satisfactorily established facts which would permit the court to grant the relief requested. The defendant has now moved to dismiss the plaintiff's complaint on the grounds that the defendant's conduct does not constitute state or governmental action and the plaintiff has not exhausted her administrative remedies provided by the Vermont Public Service Board. The plaintiff has responded to the motion by asserting that her life is being threatened by the disconnection of telephone service, she is

being discriminated against on account of her age, sex, physical and mental condition, and her financial and class status in that the defendant has allowed other customers to run up larger bills before disconnecting their service, and she could not seek administrative redress because there were no tariffs in effect at the time her telephone was disconnected.

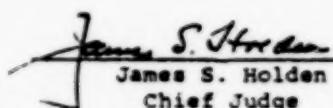
Given the liberal interpretation to which it is entitled on a motion to dismiss, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), the plaintiff's complaint appears to assert a deprivation of her 14th Amendment rights to due process, in violation of 42 U.S.C. § 1983, and a pendent claim that her rights under Vermont law have been violated. The plaintiff, however, has failed to allege the requisite state involvement for a valid claim under § 1983. The mere fact that the defendant is a state-regulated corporation is insufficient to establish the existence of this essential ingredient in the absence of an allegation that the State of Vermont, acting through its agents or officials, in some way placed its "imprimatur" on the defendant's practices. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). With respect to the allegations that the defendant has violated the plaintiff's rights under the Constitution and laws of the United States, the complaint fails to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

It is also clear that because the plaintiff has failed to state a federal claim the pendent state law claims

contained in the complaint must also be dismissed. United
Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966); see
Aldinger v. Howard, ___ U.S. ___ 49 L.Ed.2d 276, 96 S.Ct.
2413 (1976).

Accordingly, it is ORDERED: That the motion of the
defendant to dismiss the complaint is granted.

Dated at Rutland, in the District of Vermont, this
27th day of December, 1976.



James S. Holden
Chief Judge